82-1978

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CLYDE A. SIMPSON,

Petitioner

V.

COMMONWEALTH OF PENNSYLVANIA
UNEMPLOYMENT COMPENSATION BOARD
OF REVIEW,

Respondent,

THE BABCOCK & WILCOX COMPANY,

Intervenor

ON WRIT OF CERTIORARI TO THE
PENNSYLVANIA COMMONWEALTH COURT

PETITION FOR WRIT OF CERTIORARI

Claude V. Falkenhan, Esq.
201 Spruce Street
Zelienople, Pa. 16063
(412) 452-5181

PETITION FOR WRIT OF CERTIORARI

TO THE PENNSYLVANIA COMMONWEALTH COURT

Clyde a Simpson, Petitioner, prays issuance of a writ of certiorari to review the judgment of the Pennsylvania Commonwealth Court entered in the above-entitled matter September 17, 1982, to which the Pennsylvania Supreme Court, by its Order entered February 28, 1983, denied your petitioner's Petition For Allowance Of Appeal.

QUESTION PRESENTED FOR REVIEW

Petitioner's employer of 29 years suspended him from work when petitioner refused to open his lunch bucket for inspection at employer's first such demand ever made on him, and while employer did not suspect anyone of possessing its property. Petitioner had objected that such demand would be for unreasonable search and an invasion of his privacy

his union contract did not call for submission, employer had published no rule demanding submission. Now, was Pennsylvania entitled to deny petitioner unemployment compensation benefits on ground the refusal was "willful misconduct"?

LIST OF ALL PARTIES TO PROCEEDINGS BELOW

1. Clyde A. Simpson, your petitioner, represented there by his present counsel.

2. Commonwealth of Pennsylvania
Department of Labor and Industry
Unemployment Compensation Board
of Review
Labor and Industry Building
Harrisburg, Pa.,17121

Note: The Unemployment Compensation Board of Review did not appear by attorney in Pennsylvania Commonwealth Court, nor brief the case nor participate in oral argument. Intervenor Babcock & Wilcox Company, mentioned next, did enter and brief and argue, and for some reason Intervenor served a

copy of its Brief on Respondent Board at its address above but directed to the attention of one Charles Hasson, Esquire.

3. (As Intervenor)

Babcock & Wilcox Company
Beaver Falls, Pennsylvania 15010
represented in Commonwealth Court by

Richard I. Thomas, Esquire,
Thorpe Reed & Armstrong
2900 Grant Building
Pittsburgh, Pennsylvania 15219.

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TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

REPORTS OF OPINION

Pennsylvania Supreme Court rendered no opinion in petitioner's Petition for Allowance of Appeal to it at No.285 W.D. Allocatur Docket, 1982, merely an order dated February 28, 1983, denying the petition per curiam, of which petitioner was notified by letter of its prothonotary dated March 2, 1983 (A 2). Commonwealth Court's opinion (A3-A27)has been reported at 450 A.2d 305 (1982), and has not yet been reported in the official Pennsylvania Commonwealth Reports (__Pa.Cm.Cmwlth._). Respondent Pennsylvania Unemployment Compensation Board of Review entered its Decision No.B-189375 (A27 - A31) on November 3, 1980, and sent a copy to your petitioner, but that Decision was not otherwise reported officially, or to the best of your petitioner's knowledge, unoficially. Pennsylvania Unemployment Compensation Board of Review Jean M.

Warwick rendered her Referee's Decision at Appeal No. 80-6-B-289 (A-31-A34) on July 21, 1980, and served a copy on your petitioner, but her Decision was likewise not elsewhere reported officially or unoficially to the best of your petitioner's knowledge.

GROUNDS ON WHICH JURISDICTION INVOKED

Pennsylvania Commonwealth Court's judgment sought to be reviewed was dated and entered September 17, 1982, and Pennsylvania Supreme Court refused allowance of appeal on that decision on February 28, 1983. Petitioner believes this Court has jurisdiction to grant him certiorari under 28 U.S.C. Sec.1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution

Amendment 4

Unreasonable searches and seizures.

The right of the people to be secure

in their persons, houses, papers, and effect, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 14

Section 1. Citizens of the United States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdic-

tion the equal protection of the laws.

Pennsylvania Constitution

Article 1, Section 8

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizurea, and no warrant to search any place or to seize any person or thing shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pennsylvania Unemployment Compensation Law, Sec. 402(e), 43 P.S. Sec.802(e)

Ineligibility for compensation

An employe shall be ineligible for compensation for any week

(c) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work, irrespective of whether or not such work is "employment" as

defined in this act; and . . .(as amended)

STATEMENT OF THE CASE

Petitioner was subjected to a "bucket search" (his employer demanded that he open his lunch bucket for inspection as he went out the plant gate at end of shift), for the first time in 29 years with employer. He had indicated to employer that he objected to such a search as an unwarranted invasion of privacy and implied accusation of theft and deprivation of his legal and constitutional rights. This particular search was called because an electric drill was missing but the drill was found before the search began, and no one at all, much less petioner, was suspected of having employer's property on his person or in his lunch bucket. Confronted by employer's uniformed guard at the plant gate with a demand that he open his lunch

bucket for inspection by the guard, petitioner declined to open the bucket, raised it high in the air so that the guard could not get to it, and attempted to continue on his way out the plant and home. Petitioner was taken by force to the guard house and required to give his badge number, and later suspended from work for five days for failure to open his lunch bucket. He applied for unemployment compensation for the suspension period and was refused at the first level on ground of willful misconduct. He appealed, Referee Ruth Warwick awarded him compensation for the period, the employer appealed from her decision to the Pennsylvania Unemployment Compensation Board of Review (the Board)and the Board reversed. Your petitioner appealed to the Commonwealth Court, which upheld the Board by decision and opinion entered

September 17, 1982. Your petitioner then petitioned Pennsylvania Supreme Court for allowance of appeal, and that petition was denied February 28, 1983. This Petition follows.

The evidence in this case was generated at a hearing September 11, 1980, before Referee Jean M. Warwick, an initial hearing officer of the Pennsylvania Unemployment Compensation Board of Review. Referee Warwick directly asked petitioner, "Mr. Simpson, can you tell me please in your own words why you refused to open your lunch bucket that day?" Petitioner replied, "Because I felt that it was a violation of my rights. I felt that they had no right to act like I am some kind of a criminal just because I work for them . . . when it comes to this search I was . . . it was right in the Constitution and I knew that they had no right to act like this . . .

and I felt I am not going to let them do it." (A48) At that same hearing, employer's security guard Lutz, when asked what reason petitioner had given Lutz for refusing to open his lunch bucket, indicated "(H)e said it was his constitutional rights and he didn't have to let anyone take it and see it." (A44). Petitioner also provided Referee Warwick a brief (A34-A41) and stated there (A38-A39) "Claimant had a right under the Fourth Amendment to the United States Constitution and under Article 1, Section 8, of the Pennsylvania Constitution, and under Article 1, Section 8, of the Pennsylvania Constitution, to be free from an unreasonable search or seizure" and that "he had long and consistently, before any questions arose, given his employer notice that he asserted a privacy right in his lunch bucket and possessions."

In her Decision of September 19, 1980, Referee Warwick indicated "The Referee also believes the claimant's conduct as to his refusal to participate in the 'lunch box search' of May 29, 1980 was reasonable and with 'good cause' because of the claimant's strong conviction that to do so would be a violation of his human rights to privacy. Therefore,while the Referee in no questions (sic; apparently, in no way questions) the employer's right to suspend the claimant, she cannot hold that the suspension was due to wilful misconduct in connection with the claimant's work." (A34).

The Pennsylvania Unemployment Compensation Board of Review conducted its own review based solely on the Transcript, with no briefing or argument, specifically concluding that "We hold in this case the claimant's refusal to abide by the rule was not justified . . ." and "that

the practice of the employer outweighed any alleged violation of the claimant's right of privacy. Consequently, benefits must be denied since claimant's action is tantamount to willful misconduct." (A30).

In the brief your petitioner filed with Pennsylvania Commonwealth Court, at pages 12 and 13 thereof, he indicated "Claimant had a right under both the Fourth Amendment to the United States Constitution, and under Article 1, Section 8, of the Pennsylvania Constitution, to be free from an unreasonable search or seizure" and, at page 14 thereof, that "Even beyond the above-stated constitutional right, claimant had a right in his belongings, including his lunch bucket . . ." As petitioner had indicated to the Referee (A38-A39) in his brief, which was also before the Pennsylvania Unemployment Compensation Board of Review as part of the record of its Decision, "the unemployment

entitlement question is 'not whether the employer had the right to discharge for the questioned conduct of the employee, but rather whether the State is justified in reinforcing that decision by denying benefits,'" quoting a desision of the Pennsylvania Supreme Court.

Pennsylvania Commonwealth Court held that your petitioner had neither a right to be free from his employer's search, nor a right of privacy, nor a right to unemployment compensation benefits. At page 12 of the Opinion (A24-A25) it sent your petitioner in typewritten form, not yet officially reported in Pennsylvania Commonwealth Court Reports, but appearing at page 312 of the unofficial report beginning at 450 A.2d 305, that Court indicated that "However sincere the claimant may have been in his perception of his legal rights, we must conclude that his mistake in that respect was not the

kind that can be allowed to exonerate him and preserve his eligibility for unemployment benefits. His conduct was purely volitional and disregardful of his employer's interests. There is nothing in this case to indicate that the claimant's beliefs about his legal rights were other than self-induced. If he wished to gamble on the accuracy of his personal jurisprudence, the Unemployment Compensation Funds should not be required to subsidize his misconception."

Again to Pennsylvania Supreme Court, at page 4 of his PETITION FOR ALLOWANCE OF APPEAL to that Court, your petitioner had alleged that the decision to deny him unemployment compensation benefits was state action involving Pennsylvania in sanctioning and reinforcing a lawless search and an invasion of his privacy and claiming at page 5 of that same petition, that "Petitioner believes

that he is not alone among Pennsylvania workers in valuing the same dignity in his work and the conditions of that work, and demanding the same respect, as he enjoys in public and in his home."

ARGUMENT

Pennsylvania Commonwealth Court found as facts that your petitioner had never before in 29 years been confronted with this employer's demand to submit to bucket search, and had objected to the practice as violating his "human and constitutional rights, including his right of privacy." (A 9); that employer had never issued written demand to its employes to submit to such searches, though it had issued a manual of employee instructions (A7); that petitioner's union contract did not agree to such searches (A7); that there was no suspicion of any employee underlying this search (A6) yet that "the

purpose of the inspection,or search, was to see if any of the employes stopped were leaving with tools or other property belongint to the company." A5); and that your petitioner protested to employer's security guard "That the company had no right to subject him to such a search," whereafter the guard engaged in pushing and shoving with your petitioner and then took petitioner to a nearby gate-house (A5). In addition, though it was not mentioned by the Commonwealth Court, the Referee's hearing Transcript (A43) shows the following interrogation of employer's chief of plant security, one Shellenberger:

Question by Petitioner's lawyer:" Your guards, what's their relationship with the local police? Have you ever called in the police to assist your guards?" Witness Shellenberger answers: "At times, yes."

Employer's purpose was to search for and find evidence of theft, in the prosecution of which the Commonwealth would be essential. There was no reason to suspect petitioner of that theft, or any of his fellow employes on their way out the plant gate. Even the prior assistance of the police in these escapades and their availability at a phone call, show state action and a joint enterprise. Some would say that the later decision to deny petitioner unemployment compensation benefits was a form of state action hardly more direct, but at any rate petitioner is sure that decision was independent state action. As Pennsylvania has it, in unemployment compensation proceedings the issue is "not whether the employer had the right to discharge for the questioned conduct of the employee, but rather whether the state is justified in reinforcing that decision by denying benefits" for

unemployment compensation; Frumento v Unemployment Compensation Board of Review, 466 Pa. 81, 351 A.2d 631 at 634 (1976). If Pennsylvania may withhold benefits because petitioner did not submit to a demand it surely could not have made upon him, petitioner says he will be whipsawed by Pennsylvania into surrender of his federal and Pennsylvania constitutional rights to freedom from unreasonable searches and seizures and to privacy, and further be forced to submit to the tort of invasion of his privacy, on pain of waiver of unemployment compensation benefits.

Private searches remain largely outside the pale of exclusionary protection; Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971); Burdeau v McDowell, 256 U.S. 465, 476 (1921); Com. v. Baldwin, 282 Pa.Super.82, 422 A.2d 838, 846(fn.11) (1980). In some cases state involvement

may confirm exclusionary protection. Lustig v. United States, 338U.S.74, 78-9 (1949), Elkins v. U.S.,364 U.S. 206, 223 (1960), Knoll Associates, Inc. v. Federal Trade Commission, 397 F.2d 530, 535 (C.A.7, 1968); Corngold v. U.S., 367 F.2d 1, 5 (C.A.9, 1966); Com. v. Eshelman,477 Pa.93, 383 A.2d 838, 841-2 (1978); Com.v. Dembo, 451 Pa. 1, 301 A.2d 689, 693 (1973); Stapleton v. Superior Court of Los Angeles County, 70 Cal.2d 97, 73 Cal.Rpr. 575 577, 447 P.2d 967 (1969). So for the ratification in advance by a police officer of search by a private person, Com. v. Borecky, 277 Pa. Super. 244, 419 A.2d 753, 754 (1980). Too, expansion by F.B.I. agents of a private search is state action deserving exclusionary protection, Walter v. U.S., 447 U.S. 649, 657 (1980). But these are the exceptions that still prove the Burdeau rule -- when private individuals violate

Fourth Amendment search rights, exclusionary remedies are denied the victim.

Pennsylvania comsiders search by a private security employee to be a private search, as to which the person searched has no exclusionary remedy; Com. v Martin, 300 Pa. Super. 379, 446 A.2d 965, 968 (1982). So for even state employes such as school officials; Com v. Dingfelt, 227 Pa. Super. 380, 323 A.2d 145, 147 (1974).

Commonwealth Court thinks (A20) that petitioner's corporate employer is "a private party." Petitioner thinks not -- it is wholly a creature of the state of its incorporation, deriving and owing its being to that state as surely as petitioner owes his to the Almighty. That is why we are careful to distinguish between artificial and natural persons. Pennsylvania ought not to be allowed to require your petitioner's submission,

on pain of forfeiture of unemployment compensation benefits, to either a natural person or, to a fortiori, of a sister state, when it would be prohibited by our constitutions and laws from requiring that same submission to its own search.

Pennsylvania Commonwealth Court thinks (A22) that in accepting employment petitioner gave up his rights to freedome from unreasonable searches, along with what that Court takes to be his merely common-law rights to privacy, rights which your petitioner says are also federal and Pennsylvania constitutional. But the employer never even asked petitioner to surrender those rights, directly or through petitioner's union, nor was it even willing (Referee's Transcript, T 36, A46) to declare to petitioner and his fellow employes in writing a demand for such surrender. Indeed, had there been any

such surrender, it would have run to the benefit of employer, but not of Pennsylvania to relieve the Commonwealth of its unemployment compensation obligations to petitioner; and beyo;nd that, Pennsylvania ought not to be allowed, through its administrative agencies and courts, to expand upon an implied contract between petitioner and his employer for the purpose of relieving Pennsylvania from those obligations -- especially here, where there is a written contract, detailed and hard bargained between employer and United Steelworkers, covering that employment.

The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Marsh v. State of Alabama, 326 U.S. 501, 506 (1946). Now the owner of the

property, the factory, which your petitioner used to earn his daily bread was his corporate employer -- but even that is a fiction, and the ultimate owner's are that employer's stockholders. Precious few of them will likely use the property at all, and most of those in the capacity of employes -- some doubtless powerful management employes, by virtue in part of ownership of a bit of that stock, but nonetheless all employes just as your petitioner was. It is those employes who physically use the factory to earn their livelihood, the ultimate owners "using" it only to earn the profit they hope their investment brings. Since Katz v. U.S., 389 U.S. 347 (1967) it has been a truism to say that the Fourth Amendment protects people, not places. It protects those people at the kinds of places Marsh had in mind, and your

petitioner contends he took with him a modicum of dignity into the factory, in the form of his search and privacy rights. At least some labor arbitration decisions have agreed with that, Abex Corp., Stanray Products Plant and United Steelworkers of America, Local Union No.2483, 79-2ARB Para.8614, especially where search of an employee's possessions combined with assault upon the employee are complained of, National Vendors and International Association of Machinists and Aerospace Workers District No.9, 79-2ARB Par.8556.

Violation of Fourth Amendment rights has been sufficient to ground a cause of action, Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 395-6 (1971) (holding also, at page 395, that States may not authorize at least federal agents to violate the Fourth Amendment, as your petitioner thinks Pennsylvania attempted, and

retroactively at that, to authorized his employer). With a little help from the Civil Rights Act, the Fourth Amendment through the Fourteenth also served as ground for damage claims against state officers, Monroe v. Pape, 365 U.S. 167 (1961). Your petitioner of course hopes that what he sees as Pennsylvania's attempt to authorize his employer to violate his search and privacy rights, or at least its punishing him for not submitting to those violations, shocks the conscience of this court and will cause it to hear him; Rochin v. California, 342 U.S. 165 (1952).

Before its decision against your petitioner, Pennsylvania at least had some trepidation about withholding unemployment compensation benefits to an employee terminated for simple refusal to submit to search; White V Com., Unemployment Compensation Board of Re-

view, 17 Pa. Cmwlth. 110, 330 A.2d 541 (1975), carefully grounding refusal of unemployment benefits on theft of employer property rather than refusal to submit to search.

This Court has been willing to protect unemployment benefits against violation of certain at least of the Bill of Rights, chiefly First Amendment free exercise (Thomas v. Review Board, 450 U.S. 707 (1981), Sherbert v Verner, 374 U.S.398 (1963)) and free speech (Mt. Health City School District v. Doyle, 429 U.S. 274 (1977), and Pennsylvania appears to agree (Wright v Com., Unemployment Compensation Board of Review, 45 Pa. Cmwlth. 117, 404 A.2d 792 (1979)). Petitioner contends, and will amplify later, that the privacy rights he seeks to have protected against Pennsylvania are themselves penumbral emanations of the Bill of Rights generally,

but in addition he thinks it wrong that Pennsylvania may condition unemployment benefits on his submission to what are still violations of his right to freedom from unreasonable search, violations from which the Fourth Amendment would stay Pennsylvania's hand. The exclusionary rule itself is remedial, designed finally to provide remedy for what were admittedly all along violations of constitutional rights, violations whether performed by the State or private individuals. Considerations of prophylactic effect, and possibly allocation of enforcement resources, dictated that the exclusionary rule reached mainly state activity, it being considered that only there would there be real deterrent effect. As is cogently pointed out however, in an Annotation "Admissibility, in Criminal Case, of Evidence Obtained by Search by Private

Individual," 36 ALR3d 553, "It is at least arguable, however, that the force of this rationale breaks down in connection with cases involving seizure of evidence by private investigators or other security officers who act for the very purpose of obtaining evidence of crime and often with professional knowledge and skill." (id. at 558). Accord, LaFave, Search and Seizure (West Publishing Co., 1978), Sec. 1.6. Certainly here if this employer were charged with incidents of compensated unemployment brought about by violations perpetrated on its employes by its uniformed security force, there might be a considerable deterrent effect upon it rippling through the industry and among employers generally once word spreads.

Petitioner claims he had a right of privacy in his lunch bucket. A right of privacy is now recognized under the

federal constitution, grounded in the Bill of Rights, and indeed older than that venerable document, Zablocki v. Redhail, 434 U.S. 374, 384, (1978) though its borders are not yet fully marked (id., 385). Pennsylvania recognizes that right, finding it, inter alia, in the First, Fourth, and Fifth Amendments to the United States Constitution, and "in the penumbras of the Bill of Rights", Com. v. Hayes, 489 Pa. 419, 414 A.2d 318, 325 (1980); In Re"B", 482 Pa. 471, 394 A.2d 419, 424 (1978). Some of the development of that right is often said to have been at common law, Prosser, Privacy, 48 Cal. L.Rev. No.3, p.383 (Aug.1960), and receives its current formulation at Restatement of Torts, Second, Sec.652A. That section covers some of the violations petitioner feels he suffered, chiefly an unreasonable intrusion and being placed in a false

light. Petitioner himself put it that way in response to the Referee's questions (A48) "I felt that they had no right to act like I am some kind of a criminal just because I work for them." Again, "But just to grab everybody and say . . . yey, we think you might be dishonest today, show us you are not. In effect that is what you are saying. You are saying we believe you to be possibly a crook today and show us that you are not."

Pennsylvania has long recognized that privacy right, even obliging its courts to protect a prisoner's right to privacy by controlling photographing of him, In Re Mack, 386 Pa. 251, 126 A.2d 679, 683 (1956). It has specifically held an invasion of privacy the search of a customer and her purse by store employes, Bennett v. Norban, 396 Pa.94, 151 A.2d 476, 479 (1959). Federal courts have also recognized and enforced

that right when dealing with Pennsylvania law, Jenkins v. Dell Publishing Company, 251 F.2d 447 (C.A. 3d, 1958) Raible v. Newsweek, Inc.,341 F.Supp. 804 (S.D. Pa. 1972).

Your petitioner asks this Court to notice, in deciding whether to hear him, that the money stakes in this action, five days of unemployment compensation, would never reimburse for the long journey to this Court. The real grail of his quest is dignity and respect for himself and his fellow workers. A person must work for his or her and her family's bread, and is counted a better citizen for doing so. That work is a public function and benefit, done for the most part in public. The Constitution and laws are the rules of our public life and reach all its corners.

As a nation we have been specially

blessed to realize that there is nothing inherently demeaning in that work. No employer must receive the state's assistance to make it so.

APPENDIX

CONTENTS

The Supreme Court of Pennsylvan
Western District

Carl Rice, Esq.
Prothonotary

801 City Cty
Bldg., Pgh. Pa
15219

Irma T. Gardner,
Deputy Prothonotary

Claude V. Falkenhan, Esq.
201 Spruce Street
Zelienople, PA 16063

In Re: Clyde Simpson vs. Com. of Pa., et al. No. 265 MD Allocatur Docket, 1982

Dear Mr. Falkenhan:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above-captioned matter:

ORDER OF COURT

"28 February 1983
Petition denied
Per Curiam"

Very truly yours,

/s/
Carl Rice, Esq.

CR/sr

cc: Charles Hasson, Esq.
Unemployment Compensation Board of Review,
Room 1010, Labor & Industry Bldg.
Harrisburg, PA 17121

Richard Thomas, Esq.
Brian Dougherty, Esq.
2900 Grant Building
Pittsburgh, PA 15219

CLYDE A. SIMPSON, Petitioner	:	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
vs.	:	
COMMONWEALTH OF PENNSYLVANIA, UNEMPLOYMENT COMPENSATION BOARD OF REVIEW, Respondent	:	
THE BABCOCK & WILCOX COMPANY, Intervenor	:	No. 3000 C.D.1980

BEFORE: HONORABLE GENEVIEVE BLATT, Judge
HONORABLE ROBERT W. WILLIAMS, JR., Judge
HONORABLE DAVID W. CRAIG, Judge

ARGUED: February 5, 1982

OPINION BY JUDGE WILLIAMS, JR.

Filed September 17, 1982

Clyde A. Simpson (claimant) has appealed from an order of the Unemployment Compensation Board of Review (Board) denying him benefits for a one-week period that he was suspended from work. The basis for the Board's order was its conclusion that the claimant had been suspended for behavior amounting to

"willful misconduct," under Section 402(e) of the Unemployment Compensation Law (Law).[1]

On June 2, 1980, claimant Simpson was suspended from his employment at the Tubular-Products Division of the Babcock & Wilcox Company (Company); the period of actual suspension was to include the dates June 3 through June 9,1980. The reason for the claimant's suspension was his refusal to permit a Company security guard to search his lunch bucket.

When the claimant applied for unemployment compensation, the Office of Employment Security determined that he was ineligible by force of Section 402(e) of the Law. The referee disagreed with that determination, and awarded benefits. It was the referee's conclusion that the claimant had "good cause" for refusing to be searched. However, on a further

appeal by the Company, the Board reversed the referee and denied the claim for benefits.

The incident that caused the claimant's suspension occurred on May 29,1980, after he had completed his work shift that day and had started to leave the Company's premises. As the claimant and several other employees approached the exit gate, a plant security guard stationed there stopped the group and ask them to open their lunch buckets for inspection. The purpose of the inspection, or search, was to see if any of the employees stopped were leaving with tools or other property belonging to the Company.

Upon being confronted by the guard, the claimant refused to open his lunch bucket, protesting that the Company had no right to subject him to such a search. The claimant then attempted to walk past the guard and out the gate; that attempt

led to some degree of pushing and shoving between the two men. Finally, the guard took the claimant to the nearby gatehouse, to obtain from him information needed to report the incident. The claimaint never did allow his lunch bucket to be searched that day, with the consequence being his suspension a few days later.

The Company's decision to conduct the May 29 search of employee lunch buckets was initially prompted by a report that day, from a plant official, that a Company drill was missing. However, before the end of the claimant's work shift that day, the drill had been found. The the tool had been recovered was known to the interested plant officials and security personnel, including the guard that was to later confront the claimant. Nevertheless, the involved plant officials decided to proceed with the bucket search for the drill, and had not held a"routine" search in a long time.

Company witnesses admitted to the referee that, so far as they knew, the employer had never issued any written rule or notice concerning searches of employees or their possessions. Although the Company issued a manual of employee instructions, which had gone through several printings, that publication is entirely silent on the matter of searches. Equally silent on the question was the labor-management agreement in force between the claimant's union and the Company at the time of the incident here involved.

Despite the lack of any written plant rule on the subject of searches, the Company has, for several years, pursued a "practice" of conducting periodic, at-random searches of employee lunch buckets. Under the "practice," when a bucket search is ordered it is conducted at the plant exit gate, as the employees of a given shift are leaving work for the day

and are actually on their own time. During the period that a search is in effect, a plant guard will ask each employee passing through the gate to open his or her lunch bucket, so that the guard can see whether any Company property is contained therein.

According to the Company's witnesses in the instant case, the "practice" of having random bucket searches is designed to"keep the employees honest," even when there is no specific belief that an actual theft is being attempted. As for the search of May 29, 1980, the Company's evidence before the reference gave no indication that, at the time the search was ordered to proceed, the employer had any specific cause to believe that the claimant or any other worker was trying to depart with Company property.

At the time of the incident in question the claimant had been employed by

Company for about 29 years. Although he himself had never, prior to May 29,1980, been subjected to a bucket search, he was undeniably well aware of his employer's "practice" of having them. In telling the referee why he resisted the search of May 29, the claimant expressed the feeling that a search of his lunch bucket by the employer would have violated his human and constitutional rights, including his right of privacy. The referee found that the claimant's refusal to allow the search was motivated by a strong conviction that the search did violate his right of privacy. And, based on that finding, the referee concluded that the claimant had "good cause" for resisting the employer's search. It was upon that reasoning that the referee exonerated the claimant from the charge of willful misconduct, and awarded him benefits.

The Board, in reversing the referee,

determined that the Company's lunch bucket searches are a "reasonable exercise of the employer's prerogative." The Board also concluded that the claimant had failed to justify his resistance to the attempted search of his bucket. Regarding the latter conclusion, the Board held that the Company's reasonable interest in having the bucket searches outweighed the asserted infringement of the claimant's right of privacy. Thus, the Board concluded that the claimant was guilty of willful misconduct as a matter of law. However, in the process of reaching the above conclusions, the Board adopted the referee's finding as to the motivation for the claimant's defiant response to the search. The Board, as had the referee, made a specific factual finding that:

> The claimant refused to participate in the 'lunch [bucket] search' because of his strong conviction that it was a violation of his human right to privacy.

The term "willful misconduct" has no statutory definition. However, the Supreme Court of Pennsylvania has defined the term as comprehending an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has a right to expect of an employee, or negligence, indicating an intentional disregard of the employer's interest or of the employee's duties and obligations to the employer. McLean v. Unemployment Compensation Board of Review, 476 Pa. 617, 383 A.2d 533 (1978); Frumento v. Unemployment Compensation Board of Review, 466 Pa. 81, 351 A.2d 631 (1976).

It is well settled that an employee's direct refusal to comply with a request of his employer can constitute willful misconduct under Section 402(e) of the Law. E.g., Semon v. Unemployment Compensation

Board of Review, 53 Pa. Commonwealth Ct. 501, 417 A.2d 1343(1980); Kresge v. Unemployment Compensation Board of Review, 46 Pa. Commonwealth Ct. 78, 405 A.2d 1123 (1979). However, before we can decide whether such noncompliance amounts to willful misconduct in a particular case, we must evaluate not only the reasonableness of the employer's request under the circumstances, but also the employee's reason for noncompliance. If the employee's behavior was justifiable or reasonable under the circumstances, it cannot be considered willful misconduct. McLean; Frumento. In other words, if there was "good cause" for the employee's action, he cannot be deemed guilty of willful misconduct. McLean.

In an unemployment compensation case involving a charge of willful misconduct, the employer bears the burden of proving

the charge. E.g., LeGare v. Unemployment Compensation Board of Review, __Pa. __, 444 A.2d 1151 (1982). But, if the claimant seeks to justify the behavior in isssue or to show that it was reasonable, he must bear the proof burden in that respect. E.g., Devine v. Unemployment Compensation Board of Review, 59 Pa. Commonwealth Ct. 318, 429 A.2d 1243 (1981); Lake v. Unemployment Compensation Board of Review, 48 Pa. Commonwealth Ct. 138, 409 A.2d 126 (1979); Holomshek v. Unemployment Compensation Board of Review, 39 Pa. Commonwealth Ct. 503, 395 A.2d 708 (1979).

Equipped with the foregoing legal principles, we now consider their application to the case at bar.

The Company certainly has a valid interest in trying to prevent its employees from departing the plant premises with Company property. It seems clear, moreover, that the employer is entitled

to pursue reasonable security measures to prevent or reduce the incidence of such thefts. In our view, the bucket searches that the Company conducts from time to time do not unduly burden the employees. According to the overall testimony in this case, the "routine" bucket searches are conducted only occasionally. And, when a "routine" search is in effect, it simply requires the departing employees to open their buckets or containers as they pass through the plant gate. When such a search is in effect, it is not directed at any particular person; rather, every employee going through the gate during that time is asked to comply. In sum, the bucket searches are infrequently conducted, objectively executed, and done with what would seem to be little inconvenience to the employees. As for the Company's randomness in ordering these end-of-shift searches, it is conceivable that the very uncertaintly as to

when a search will be held could serve to discourage employee larceny.

When we weigh the security interest the bucket searches are intended to serve, against the slight degree of inconvenience or intrusion they actually entail, we are drawn to the conclusion that the Company's bucket search"practice" is a reasonable one, at least on that scale of measurement.

Before this Court, the claimant seeks to justify his alleged misconduct by relying on the search and seizure provisions of the Fourth Amendment of the United State Constitution and Article 1, Section 8, of the Pennsylvania Constitution. He asserts that the employer's attempt to search his lunch bucket violated the above constitutional provisions, and that he thus had a legal right to resist the search. Taking his position

one step further, the claimant argues that for the state to deny him unemployment benefits because of the conduct in issue, would amount to state action that deprives him of the rights guaranteed by the aforesaid constitutional provisions.

It is firmly settled that the Fourth Amendment of the United States Constitution applies only to the actions of governmental authorities, and is inapplicable to the conduct of private parties. Walter v. United States, 447 U.S. 649 (1980); Burdeau v. McDowell, 256 U.S. 465 (1921); Commonwealth v. Borecky, 277 Pa.Superior Ct.244, 419 A.2d 753 (1980). The same is true of the search and seizure provision in the Pennsylvania Constitution. Commonwealth v. Dingfelt, 227 Pa. Superior Ct. 380, 323 A.2d 145 (1974); see Pa. Const. art I,Sec. 25. It follows, then, that the right the claimant seeks to establish against his employer, a private entity, is not a right

that arises from the constitutional provisions the claimant relies on. Moreover, since the claimant's rights against governmental searches are not here involved, it cannot be argued validly that a denial of unemployment benefits, because of his resistance to his employer's search, will impair his constitutional rights relative to intrusions by the government itself.

True, there have been decisions which, based on specific guarantees in the Bill of Rights of the federal constitution, have invalidated a state's denial of unemployment compensation. For example, in Sherbert v. Verner, 374 U.S. 398 (1963), the United States Supreme Court held that the refusal of a Seventh-day Adventist to work on Saturdays, because it was her sabbath, could not be deemed a disqualifying refusal to accept suitable employment. The basis for the Court's decision in Sherbert was that a denial of unemployment benefits, because of the claimant's refusal to work on her sabbath, violated the freedom of religion specifically guaranteed by the Free Exercise Clause of the First Amendment. Recently, in Thomas v. Review Board, Indiana Employment Security Division, 450 U.S. 707 (1981), the Supreme Court again

applied the Free Exercise clause to invalidate a denial of unemployment benefits.

In Thomas , the claimant had voluntarily terminated his employment after his employer transferred him to armaments production. The claimant was a Jehovah's Witness, and the tenets of his religion prohibited him from participating in the production of arms; for that reason he resigned from his job. The Indiana compensation authorities decided that the claimant's religious scruples did not provide "good cause" for quitting his job, and denied him benefits on that ground. The United States Supreme Court held that for the state to deny the claimant benefits, because he had honored his religious principles, violated his constitutionally guaranteed freedom of religion. The Court reasoned that a denial of benefits under such circumstances forces an employee to choose between his religion and his job, with the price of choosing the former being the loss of state benefits. The Court further reasoned that such a state-coerced choice would unduly burden an employee in the exercise of his religious beliefs.

Another instance of applying the First Amendment to invalidated a denial of unemployment benefits was our decision in Wright v. Unemployment Compensation Board of Review, 45 Pa. Commonwealth Ct. 117, 404 A.2d 792 (1979). That case involved the constitutional right of free speech. We held that the claimant's public criticism of his government employer, on matters of public interest, could not amount to disqualifying willful misconduct; because, the criticism was the kind of speech that is protected by the First Amendment.

In Sherbert, Thomas and Wright, respectively, the claimant's course of action represented conduct that is the subject of specific constitutional protection. The Bill of Rights of the federal constitution, by virtue of the First Amendment, bars the government from prohibiting the free exercise of religion and from abridging the freedom of speech. Thus, those rights

are ones that are constitutionally guarded against substantial governmental restraints on their exercise. And, as the above cases held, a state's denial of unemployment benefits because a person has exercised one of those rights is an impermissible restraint.

As noted already, the claimant in the instant case asserts that he has a legal right to be free of searches by his employer, a private party. The claimant also asserts that the right is one of constitutional dimensions. From the latter premise, he further argues that for the state to deny him benefits, because he sought to enforce that right, would impair a constitutionally guaranteed freedom. In sum, according to the claimant, his resistance to his employer's bucket search was constitutionally protected conduct.

However, neither the federal con-

stitution nor our state constitution is, of itself, a source of substantive legal rights against searches by private parties. That is, a person's right to be free of such searches is not the subject of a guarantee in either constitution; at least not in the direct sense that the claimant argues. A person's right to be free of private searches of his property is one that aries, for the most part, from common law property rights.[2] It would seem, therefore, that the issue in the employer search, or to stand on his head because the employer so requests. The extent to which the implied obligation to cooperate will be deemed to prevail over an allegedly reserved common law right must, in effect, rest on a conclusion about the circumstantial reasonableness of the employer's request and its burdensomeness to the employee. Indeed, an employer's request cannot be deemed reasonable if it

will unduly burden an employee; and as to such a request there can be no implied obligation to cooperate.

But if an employer's request can be deemed circumstantially reasonable, after considering the burden to the emloyee, then the employee has an implied obligation to cooperate. Although there might be practical reasons that can justify an employee's refusal to cooperate, such noncompliance cannot be predicated upon asserted common law personal and property rights. As to employer requests that are reasonable in the above sense, the employee has waived those rights as a basis for noncompliance; he waived them when he voluntarily assumed the legal relationship with his employer.

In this case, the claimant deliberately failed to cooperate with his employer by refusing to comply with a known, at-plant security measure designed, in its

own way, to protect the employer's property. The measure was not one that was used on a frequent basis, and when resorted to, was not directed at any particular employee. The most that the security measure required of the claimant, as it did of other employees, was that he open his lunch bucket as he passed through the plant exit gate. When we compare the employer's interest in having the measure with the degree of burden to the employees, we must conclude that the employer's request for cooperation was circumstantially reasonable. That being so, the claimant had an implied obligation to cooperate. In an effort to justify his noncompliance, the claimant has relied on legal precepts that do not apply to the request the employer made of him. Accordingly, the claimant has failed to demonstrate "good cause" for his refusal to comply. [3]

There remains one issue for our consideration. The Board, with its almost limitless powers of fact-finding, determined, in effect, that the claimant actually believed he had a legal right to resist the Company's bucket search. We must consider whether that finding imputes to the claimant a state of mind that negates willful misconduct; even though the claimant has not raised the point in this appeal. Whether or not an employee's actions constitute willful misconduct is a question of law subject to judicial review. E.g., McLean, supra. Therefore, we must review the legal conclusion that the Board has drawn from its own findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977).

However sincere the claimant may have been in his perception of his legal rights, we must conclude that his mistake

in that respect was not the kind that can be allowed to exonerate him and preserve his elibibility for unemployment benefits. His conduct was purely volitional, and disregardful of his employer's interest. There is nothing in this case to indicate that the caimant's belief about his legal rights were other than self-induced. If he wished to gamble on the accuracy of his pursonal jurisprudence, the Unemployment Compensation Fund should not be required to subsidize his misconception.

For the reasons set forth in this opinion, the order of Board denying benefits is affirmed.

/S/
Robert W.Williams,Jr.,Judge

Judge Mencer did not participate in the decision in this case.

F O O T N O T E S

1. *Act of December 5,1936, Second Ex.Sess.*, P.L.(1937) 2897, as amended,43 P.S. Sec.802(e).

2. As observed, the claimant has also referred to his "right of privacy." The "right of privacy," in its constitutional sense, has been declared to a penumbral emanation of the Fourth Amendment and other specific guarantees in the Bill of Rights of the federal constitution. Griswold v. Connecticut, 381 U.S. 479 (1965). However, what we have already said about the inapplicability of the Fourth Amendment to the conduct of private parties must also be said about the constitutional "right of privacy." Therefore, the only "right of privacy" the claimant can attempt to raise is the one that exists among a person's common law rights against private parties.

3. Although the incident here in issue occurred after the claimant's work shift was technically over, that fact does not prevent his behavior from being willful misconduct. Nevel v. Unemployment Compensation Board of Review, 32 Pa. Commonwealth Ct. 6, 377 A.2d 1045 (1977).

CLYDE A. SIMPSON, Petitioner v. COMMONWEALTH OF PENNSYLVANIA, UNEMPLOYMENT COMPENSATION BOARD OF REVIEW, Respondent THE BABCOCK & WILCOX COMPANY, Intervenor	IN THE COMMONWEALTH COURT OF PENNSYLVANIA No. 3000 CD. 1980

ORDER

AND NOW, the 17th day of September, 1982, the order of the Unemployment Compensation Board of Review at Decision No. B-189375 is affirmed.

/S/

Robert W. Williams, Jr., JUDGE

(certified from the Record

Sept.1/ 1982

/s/ Francis C. Barbush
chief clerk

Commonwealth of Pennsylvania
Department of Labor and Industry
UNEMPLOYMENT COMPENSATION BD.OF REVIEW
Labor & Industry Building
Harrisburg,Pa. 17121

DECISION AND ORDER

Appeal No.	S.S.acct.no.	DecisionNo.
B-80-6-B-289	166-26-3253	B-189375

Decision Mailing date November 3, 1980

concerning claim of

CLYDE A.SIMPSON
R.D.2, Box 763
Fombell, PA 16123

Employer

BABCOCK& WILCOX CO.
Beaver Falls,PA 15010

date and nature of referee's decision.
Sept.19,1980

Date of application for benefits
June 1 , 1980

The determination of the Office is reversed and benefits are granted for compensable week ending June 7, 1980.

Compensable week ending Date(s)
June 7, 1980

Appeal from Referee's decision filed by:

Claimant XX-Employer Bureau

Findings of Fact:

1. The claimant was last employed by Babcock & Wilcox Company for 29 years as a machinist at the final pay of $10.75 per hour. For the purpose of this appeal, his last day of work was June2,1980.

2. It has been both past and present practice of the employer to conduct "lunch box searches" of employes on a periodic and random basis.

3. The "lunch box searches" take place as employes are exiting the plant at the end of their respective work shift and involves both management and hourly personnel and includes both male and female employes.

4. The purpose of the "lunch box searches" is to prevent and discover possible theft of company property.

5. On May 29,1980, a "lunch box search" was conducted by the employer.

6. The claimant refused to participate in the "lunch box search" because of his strong conviction that it was a violation of his human right to privacy.

7. The claimant was suspended for one week as a result of his refusal to

participate in the "lunch box search" of May 29, 1980.

The foregoing Findings of Fact made by the Referee are supported by the evidence and are adopted by the Board of Review. In addition, the Board finds as follows:

8. The "lunch box search" was a reasonable exercise of the employer's prerogative.

9. The Claimant returned to work on June 10, 1980.

RE: B-80-6-B-289

DISCUSSION: The Office of Employment Security determined the claimant to be ineligible for benefits under Section 402(e) of the Law. From this determination the claimant appealed. The claimant appeared at a Referee's hearing together with claimant's counsel, a witness in the claimant's behalf, the claimant's union representative and five witnesses for the employer. The Referee reversed the determination of the Office and the employer appealed.

Section 402(3) of the Law provided that a claimant shall be ineligible for compensation for any week in which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work. While the term "willful misconduct" is not defined in the Law, the Board of Review and the Appellate Courts in numerous decisions have defined willful misconduct as an act of wanton or willful disregard of the employer's interests, a deliberate violation of the employer's rules, a disregard of the standards of behavior which the employer has a right

to expect of an employe, or negligence indicating an intentional disregard of the employer's interests or of the employe's duties and obligations to the employer.

The claimant had a 29-year tenure with the employer as a machinist and was suspended for one week on June 2, 1980. He returned to work on June 10, 1980. The employer had a practice of searching lunch boxes of both male and female employes which was objectional to the claimant. When the claimant was asked to undergo this procedure, he refused and was suspended. This case will turn on whether the rule requiring searches was reasonable. This inquiry the Board answers in the affirmative. Even if the requirement is reasonable, we must then evaluate the claimant's refusal under the doctrine promulgated in Frumento v. Unemployment Compensation Board of Review, 466 Pa. 81, 351 A.2d 631 (1976). We hold in this case that the claimant's refusal to abide by the rule was not justified. Further, as pointed out in Hughes V Unemployment Compensation Board of Review, 40 Pa. Commonwealth Ct. 638, 398 A.2d 236 (1979), the reasonableness of the employer's request must be balanced with the reasonableness of the employee's refusal. In this regard, we hold that the practice of the employer outweighed any alleged violation of the claimant's right of privacy. Consequently, benefits must be denied since the claimant's action is tantamount to willful misconduct.

CONCLUSION OF LAW: The claimant is ineligible for benefits under Section 402(e) of the Pennsylvania Unemployment Compensation Law.

ORDER: The decision of the Referee is reversed and benefits are denied.

UNEMPLOYMENT COMPENSATION
BOARD OF REVIEW

Maurice Abrams, Chairman

Joseph J.McAneny,Member

James P. Breslin,Member

PENNSYLVANIA UNEMPLOYMENT COMPENSATION
BOARD OF REVIEW

REFEREE'S DECISION

Decision mailing date - Sept.19,1980

S.S. Acct. No. 166-26-3253

Appeal No. 80-6-B-289 Appeal date - July 21, 1980

concerning the claim of
Clyde A. Simpson
R.D.2, Box 763
Fombell,PA 16123

Employer-BABCOCK&WILCOX CO.
Beaver Falls,PA 15010

date and nature of Bureaus Decision:
7-16-80 Claimant ineligible-Separation due to willful misconduct in connection with his work-Section 402(e).

Hearing date and Location
September 11,1980 -Rochester,PA

Date of Application for Benefits
6-1-80

Compensable week ending date
6-7-80.

Hearing Appearances
XX Claimant
X Employer
Bureau Representative
X Others (see BD-109)

Date application for benefits 6/1/80
Compensable week ending date 6/7/80.
Waiting week ending date (blank)

Claimant Appeal XX
Employer appeal (blank)

FINDINGS OF FACT:

1. The claimant was last employed by Babcock & Wilcox Company for 29 years as a machinist at the final rate of pay of $10.75 per hour. For the purpose of this appeal, his last day of work was June 2, 1980.
2. It has been both past and present practice of the employer to conduct "lunch box searches" of employees on a periodic and random basis.
3. The "lunch box searches" takes place as employees are exiting the plant at the end of their respective work shift and involves both management and hourly personnel and includes both male and female employees.
4. The purpose of the "lunch box searches" is to prevent and discover possible theft of company property.
5. On May 29, 1980 a "lunch box search" was conducted by the employer.

6. The claimant refused to participate in the"lunch box search" because of his strong conviction that it was a violation of his human right to privacy.

7. The claimant was suspended for one week as a result of his refusal to participate in the"lunch box search" of May 29, 1980.

8. The claimant returned to work on June 10,1980.

REASONING: Section 402(e) of the Law provides that a claimant shall be ineligible for compensation for any week in which his unemployment is due to his discharge or temporary suspension from work for wilful misconduct connected with his work. While the term "wilful misconduct" is not defined in the Law, the Board of Review and the Appellant Court in numerous decisions have defined wilful misconduct as an act of wanton or wilful disregard of the employer's interests, a deliberate violation of the employer's rules, a disregard of the standards of behavior which the employer has a right to expect of an employee, or negligence indicating an intentional disregard of the employer's interests or of the employee's duties and obligations to the employer.

The claimaint was discharged for his refusal to participate in a "lunch box search" conducted by the employer on May 29, 1980.The claimant engaged in such conduct.

After a careful review of the entire record, the Referee believes the employer's practice of conducting "lunch box searches" was reasonable in light of nondiscriminatory manner in which such searches are conducted and the intended purpose of the search. The Referee also believes the claimant's conduct as to his refusal to participate in the "lunch box search" of May 29, 1980 was reasonable wnd with "good cause" because of the claimant's strong conviction that to do so would be a violation of his human rights to privacy. Therefore, while the Referee in no -- questions the employer's right to suspend the claimant, she cannot hold that the suspension was due to wilful misconduct in connection with the claimant's work. Consequently, there can be no denial of benefits under the provisions of the above cited Section of the Law.

ORDER: The determination of the Office is reversed and benefits are granted for compensable week ending June 7, 1980.

/S/
Jean M. Warwick, Referee

rjf

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LALOR AND INDUSTRY
UNEMPLOYMENT COMPENSATION BD.OF REVIEW

IN RE: claim of
Clyde A. Simpson
R.D.#2, Box 763
Fombell, Pa. 16123

Appeal No.80-6-B-289
S.S.No.166-26-3253

CLAIMANT'S BRIEF ADDRESSED TO REFEREE WARWICK IN SUPPORT OF UNEMPLOYMENT COMPENSATION CLAIM

It is the Employer's burden to prove wilful misconduct on the part of his employee, where alleged; Frick v. Unemployment Compensation Board of Review, __ Pa.Cmwlth. _, 375 A.2d 879 (1977); Unemployment Compensation Board of Review v. Vereen, __Pa.Cmwlth.__, 370 A.2d 1228(1977); Sorge v. Unemployment Compensation Board of Review, __Pa.Cmwlth.__, 370 A.2d 818 (1977). There is a sharp legal distinction between wilful misconduct under the statute and the Employer's policy claimed to be adequate cause for discharge; W.R.Grace v. Unemployment Compensation Board of Review, __Pa. Cmwlth.__, 412 A.2d 1128 (1980). The Employer bears a heavy burden of demonstrating deliberate violation by the employee, of its reasonable rules (where those rules are published, as here they were not) or of demonstrating disregard of standards which the Employer has a right to expect of the Employee;

Unemployment Compensation Board of Review v Grossman, __ Pa.Cmwlth. __, 349 A.2d 779 (1976). Even a violation of published rules is not tantamount to willful misconduct, but there must be a separate finding whether there was good cause for their violation in the specific instance complained of: Holomshek v. Unemployment Board of Review, __Pa.Cmwlth.___, 395 A.2d 708 (1979). Even where rules have been promulgated and published, if their enforcement has been lax or spotty in the past, and there is no more recent notice by the Employer of his intent to begin enforcing them specifically, they will not support a charge of willful misconduct; Williams v. Unemployment Compensation Board of Review, __Pa.Cmwlth.__, 380 A.2d 932 (1977). A single instance of violation of rule is ordinarily not enough to make out a charge of willful misconduct; Morgan v. Unemployment

Compensation Board of Review, 176 Pa. Super. 297, 106 A.2d 618 (1954).

The trier of fact must look both to the reasons for non-compliance, and to the reasonableness of the employer's request in light of all the circumstances; Unemployment Compensation Board of Review v Iacano, Pa.Cmwlth__, 372 A.2d 1267 (1977). An employer's demand, in order to create in the employer a right to expect compliance, must be reasonable. Again, the employee's refusal to comply is not willful if the refusal is justifiable or reasonable. In either case, a charge of "willful misconduct" cannot stand as a bar to the areceipt of unemployment compensation; McClean v Unemployment Compensation Board of Review, 476 Pa. 617,383 A.2d 533 (1978). In unemployment compensation proceedins the issue is "not whether the Employer had the right to dircharge for the question-

ed conduct of the employee, but rather whether the state is justified in reinforcing that decision by denying benefits" for unemployment compensation; Frumento v Unemployment Compensation Board of Review, 466 Pa.81, 351 A.2d 631, at 634 (1976), also citing with approval, McClean, supra. The reasonability of the Employer's rules is a question of fact; Unemployment Compensation Board of Review v Homsher, __Pa.Cmwlth.__,347 A.2d 340 (1975). An employee has a right to question an Employer's position, and if this questioning is done in a non-abrasive manner (and here all the abuse was visited upon Claimant) it does not, without more, constitute willful misconduct; Luketic v. Unemployment Compensation Board of Review, __Pa.Cmwlth.__, 386 A.2d 1045 (1978).

Claimant had a right both under the Fourth Amendment to the United States

Constitution, and under Article 1, Section 8, of the Pennsylvania Constitution, to be free from unreasonable search or seizure. Before unemployment compensation benefits could be denied a claimant on ground that he had his employer's property in his possession, (and here, there was no probable cause to suspect Claimant of having any such property in his possession, for he had long and consistently, before any question arose, given his employer a notice that he asserted a privacy right in his lunch bucket and possessions) it was first necessary to determine that the dismissal was on the specific ground of possession of the employer's property, and not rather on the ground that the employee had refused to submit to search; White v. Unemployment Compensation Board Of Review, 17 Pa.Cmwlth. 110, 330 A.2d 541 (1975). A fundamental constitutional right is involved in an illegal search,

and a waiver of rights to be free from such searches will not lightly be found; Cmwlth. v. Burgos, 223 Pa. Super. 325, 299 A.2d 34,37 (1972).

An employee's basic constitutional rights against illegal searches and seizures are operative both inside and out of the plant, and the employee cannot be disciplined for exercising these rights; ALEX CORPORATION, STANRAY PRODUCTS PLANT and UNITED STEELWORKERS OF AMERICA, LOCAL UNION NO.2483, 79-2 ARB para. 8614. So also an attempt to search an employee's possessions, combined with an assault upon that employee (as is amply demonstrated against Claimant) for failure to submit to the search, is ground for reinstatement with full back pay. NATIONAL VENDORS and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT NO.9, 79-2 ARB para. 8556.

Even beyond the above-stated constitutional rights, Claimant had a right of privacy in his belongings, including his lunch bucket, a common-law right recognized both on the federal (Jenkins v Dell Publishing Co., 251 F.2d 447,449, Cert. den. 78 S.Ct. 1362, 357 U.S. 1921 2 L.Ed w.d 1365 (1958)) and state (In Re Mack, 386 Pa. 251, 126 A.2d 679,683 (1956); Uniform Single Publications Act, 12 P.S. Sec.2090.1 et seq.) levels. A public search of one who has done nothing wrong is a specific violation of this right; Bennett v. Norban, 396 Pa. 94, 151 A.2d 476,478 (1959). That right is a fundamental constitutional right; In Re "B", __Pa.__, 394 A.2d 419 (1978) and the many cases therein cited, especially at 394 A.2d pp. 424 and 425.

Respectfully submitted,
/S/
Claude V. Falkenhan,
Atty. for Claimant

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
UNEMPLOYMENT COMPENSATION BD. OF REVIEW

TRANSCRIPT OF TESTIMONY

IN RE: Claim of Clyde A. SIMPSON
R.D.2,Box 763
Fombell,PA 16123

SS. No. 166-26=3253

Appeal No. 80-6-B-289

Date of Hearing - September 11, 1980

Place of Hearing - Rochester Job Svc.Ofc.

Hearing Before R - Jean M. Warwick

APPEARANCES:

Claimant C - Clyde A. Simpson

Counsel for Claimant CL- ClaudeV.Falkenhan
Attorney at Law
201 Spruce St.
Zelienople,PA
16063

Claimant's Witness - CW Ronald Bender
226 4th St.
Beaver,PA 15009

Claimant's Union Representative -CU - Joseph W.Orosz,
President
United Steelworkers of America,
Local 1082
828 7th Avenue
Beaver,PA 15010

List of APPEARANCES (Cont'd) Clyde A. Simpson
80-6-B-289

Employer Representatives

EW1- William A.Frankland, Industrial Relations Manager

EW2- Gene Douglass,Suprvsr. of Employee Benefits

EW3- Richard Tunno, General Foreman,Maintenance

EW4- Roy Lutz, Guard

EW5- Donald Shellenberger, Chief,Plant Security

Babcock and Wilcox Co.
Beaver Falls, PA 15010

[What follows are excerpts from a 60 page transcript .]

. . .

QCL: Your guards, what's their relationship with the local police? Have you ever called in the police to assist your guards?

AEW5: At times, yes.

. . .

QR: All right. Did you say anything to him at that time?

AEW4: Yes. I was trying to talk to him into letting me take and see in his bucket but he was really mad and ..

QR: And what did you say to him specifically, Mr. Lutz? As far as you can remember.

AEW4: Well, as far as I can remember I told him .. what I mean ... that he ... why he wouldn't take and do it and he said it was his constitutional rights and he didn't have to let anyone take it and see it.

QCL: Mr. Falkland, do you know whether ...well, Mr. Douglass I believe said there isn't anything more in the company .. that these were... rules about bucket searches are not covered in the contract. Now, are you party or signatory to any of the governing union contracts?

AEW1: Yes, I am.

QCL: You signed certain passages of it for the company?

AEW1: Yes, I have.

QCL: You are intimately familiar with all the aspects of the contract?

AEW1: I am familiar with most aspects of the contract.

QCL: Well, would you agree with Mr. Douglass that these rules about bucket searches are not covered by the contract?

AEW1: Not .. no .. I don't know of any place in the labor agreement that covers that specifically.

. . .

QCL: Are there published rules published to the employees saying that it is the rule of this company that you are subject to bucket searches?

AEW1: No.

QCL: Has there ever been?

AEW1: Not to my knowledge.

. . .

QCL: Do you plan any announcements or publications of rules to the employees relative to bucket searches and the company's demand that they submit to them?

AEW1: Not at the present. Not without legal counsel. I don't really believe ...personally believe that there is at this time for any need for notifying employees that. As I told you, this ... these bucket searches have been going on with frequency over a long period of time.

QCL: All right. You don't ..

AEW1: And

QCL: I'm sorry.

AEW1: I believe that all present employees are aware that the bucket searches are made periodically.

QCL: Okay.

AEW1: All new employees, of course, go through the orientation program.

QCL: Okay. So you don't plan to publish any rules until you check with counsel?

AEW1: At this point I don't plan to publish any rules and I wouldn't do so without checking with counsel.

QCL: So at the point you say that you would formally announce to the employees that the company asserts the right to search buckets and demands that employees submit, you would first carefully check with counsel before you told the employess in writing that they were subject to search. Is that so?

AEW1: No. That isn't what I said.

QCL: Well, why would you check with counsel before putting in writing what you are happy to have as a practice and an oral policy?

AEW1: I am not sure .. I think that I

have lost my train of thought. I would like your question . .

QCL: Okay. Yes. Of course. Why would you carefully check with counsel before putting a rule in writing and publishing it to employees, if the rule related to what you say already happens and is already authorized by practice and is told orally by management to employees at least in orientation sessions. If it is the same rule, why would you have to check with counsel before you put it in writing if you enforce it anyway?

AEW1: I don't think that we ... as a matter of fact, I think that you establish that there is no rule. There isn't . .

QCL: I'm asking you... I asked you whether you intended to and you said, certainly I would check with counsel before I put that in writing and published it to the employees.

AEW1: I think that I said to you that I don't believe that there is a need for doing it and I would only do

it if counsel told me that there was a need for doing it.

QCL: And you do . . . .

AEW1: I don't believe that there is a need to do it.

. . .

QR: Mr. Simpson, can you tell me plese in your own words why you refused to open your lunch bucket that day?

AC: Because I felt that it was a violation of my rights. I felt that they had no right to act like I am some kind of a criminal, just because I work for them. And they have all kinds of rules and regulations about signing for things and all kinds of stuff that always tell you, hey, you're dishonest. You know, we have got to keep an eye on you. And .. when it comes to this search I was .. it was right in the Constitution and I knew that they had no right to act like this and .. and I felt that I am not going to let them do it.

QR: All right. Mr. Simpson, do you feel this right ... that you have this privacy and it extends to

people other than just your employer?

AC: Oh, yes. Of course, sure I do.

QR: My question is would you object to being searched by anybody, be it your employer or someone else?

AC: Yes. Policeman or anybody. You know, if they have got their reason. In other words if they were to come out there and say, look, Clyde, we saw you do this. You know, and if it was done with any kind of ...

R: Okay. Continue please.

AC: Okay. If a .. if a policeman there and he said that we are accusing you and you have got this in your bucket, you know. I could understand that. I mean I wouldn't say, oh, no and take off and run or something. But just to grab everybody and say ... say .. hey, we think you might be dishonest today, show us you're not. In effect that is what you are saying. You are saying we believe you to be possibly a crook today and show us that you're not. I object to that. I really think that this is the wrong thing to do.

[End excerpts from Transcript]

No. 82-1978

In the Supreme Court of the United States

OCTOBER TERM, 1982

CLYDE A. SIMPSON,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, UNEMPLOYMENT COMPENSATION BOARD OF REVIEW,
Respondent

and

THE BABCOCK & WILCOX COMPANY,
Intervenor

ON WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

Brief for Intervenor

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COUNTERSTATEMENT OF QUESTION PRESENTED

Was it a violation of the Fourth Amendment to the Constitution of the United States or of the petitioner's Constitutional right to privacy, as made applicable to the states by operation of the Fourteenth Amendment, for the Commonwealth of Pennsylvania to deny unemployment compensation benefits to the petitioner for a period of time during which the petitioner was placed on disciplinary suspension for insubordination by his employer—a private, publicly held corporation—for refusing to comply with his employer's request that he open his lunch bucket during a random, routine inspection of employees' packages at the end of a work shift?

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COUNTERSTATEMENT OF THE CASE

The present case involves a claim for unemployment compensation benefits by the petitioner, Clyde A. Simpson, for a week in June, 1980 during which he was suspended from work by his employer, the Babcock & Wilcox Company (hereinafter the "Company"), for insubordination. The underlying reason for Mr. Simpson's disciplinary suspension was his refusal on May 29, 1980 to submit to a routine inspection of his lunch bucket by security personnel as he was leaving Company premises at the end of his shift (Petitioner's Appendix A4, A28-29, A32-33).

For at least the last twenty-eight (28) years, perhaps longer, the Company has maintained a practice of periodically conducting random inspections of employee's packages as they leave the plant at the end of a shift (Petitioner's Appendix A7-A8, A28, A32). This practice has been accepted as a term and condition of employment by the United Steelworkers of America, Local No. 1082, which union has been certified by the National Labor Relations Board as the exclusive representative of a bargaining unit of Company employees, of which Mr. Simpson is a member, for the purpose of collective bargaining in respect to wages, hours and all other terms and conditions of employment. The union has not challenged the practice either through collective bargaining or through the contractual grievance procedure.

The purpose of these inspections is to aid in the enforcement of the Company's rule against theft of Company property (Petitioner's Appendix A8, A28, A32). All employees, including Mr. Simpson, were aware of the Company's practice dealing with lunch bucket inspections and were aware further that compliance with that practice was an obligation which they voluntarily assumed as part of their continued employment (Petitioner's Appendix A8-A9, A22-A23). The inspections themselves are conducted on Company premises. No employee

leaving the plant at the appointed time, including foremen and other salaried or managerial personnel, is exempt (Petitioner's Appendix A28, A32).

On May 29, 1980, the Company conducted just such an inspection (Petitioner's Appendix A28, A32). As Mr. Simpson and a group of other employees were leaving the plant at the end of their shift, they were asked by security personnel to open their lunch buckets. Mr. Simpson adamantly refused to cooperate. He was escorted to the adjacent gatehouse for identification purposes, so that the incident could be reported to Company authorities.[1] He then left the plant, without having permitted the inspection of his lunch bucket (Petitioner's Appendix A5-A6).

As noted, Mr. Simpson was suspended for one week for his insubordination. He applied for unemployment compensation benefits for that period. The Pennsylvania Office of Employment Security determined that his suspension was occasioned by his own "willful misconduct" and that he was therefore ineligible for benefits under §402(e) of the Pennsylvania Unemployment Compensation Law, Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, Pa. Stat. Ann. tit. 43, §802(e) (Purdon). (Petitioner's Appendix A4). Pennsylvania Unemployment Compensation Referee Jean M. Warwick, however, reversed the Office's decision and awarded benefits, concluding that, although "the employer's practice of conducting 'lunch box searches' was reasonable," "the claimant's conduct...was [also] reasonable and with 'good cause'" (Petitioner's Appendix A34.) The Company appealed, and the Pennsylvania Unemployment Compensation Board of Review reinstated the Office's finding of willful

[1] Contrary to the contentions of Mr. Simpson's counsel, the record does not support his statement that Mr. Simpson "was taken by force to the guardhouse." In this regard, it is worth noting that Mr. Simpson has never instituted civil or criminal proceedings for assault and battery or false imprisonment, either against the Company or against its security personnel.

misconduct. The Board ruled that, with regard to the question of reasonableness, the Company's interests outweighed those of Mr. Simpson (Petitioner's Appendix A30).

Mr. Simpson then pressed his claim to the Pennsylvania Commonwealth Court, arguing, as he had below, that the Company's practice of lunch bucket inspections violated his constitutional right against unreasonable searches and seizures and his constitutional and common law rights to privacy. Therefore, he reasoned, his refusal to cooperate with that practice could not constitute willful misconduct. The Commonwealth Court, speaking through Judge Williams, rejected each of Mr. Simpson's arguments and affirmed the Board's denial of benefits (Petitioner's Appendix A3-A27). The Pennsylvania Supreme Court, by order of February 28, 1983, in response to Mr. Simpson's Petition for Allowance of Appeal, declined to review the Commonwealth Court's decision (Petitioner's Appendix A2).

SUMMARY OF ARGUMENTS

1. This Court's jurisdiction to review the present case is based entirely on the petitioner's claims that the Company's practice of randomly inspecting employees' packages violates the Fourth Amendment or the petitioner's federal Constitutional right to privacy. These Constitutional guarantees, however, protect individuals only against governmental intrusion; state action is a requisite element of the petitioner's claims. The Company is a private party and conducts its inspections of employees' packages without participation by or color of governmental authority of any kind. In fact, the petitioner has presented no plausible argument that state action was involved in the present case. His Constitutional claims are frivolous and wholly without foundation. Where this is so, this Court is without jurisdiction to review such claims.

2. The decisions of the Pennsylvania courts for which the petitioner seeks review, insofar as they determine claims aris-

ing under the Constitution of the United States, do not conflict with decisions of this Court or of other state or federal courts. Furthermore, the Pennsylvania courts have decided no heretofore unsettled question of federal law. Rather, the state courts have simply applied well settled principles of Constitutional law to the circumstances of this case. Accordingly, review by this Court is not warranted, and certiorari should be denied.

ARGUMENT

I. This Court is without jurisdiction to review the decisions of the Pennsylvania courts in the present case.

In the Pennsylvania courts the petitioner has variously argued that he should have received unemployment compensation benefits because the Company's practice of randomly inspecting employees' packages violated (1) his right under the Fourth Amendment to the Constitution of the United States against unreasonable searches and seizures, (2) his federal Constitutional right of privacy, (3) his right under Article I, Section 8 of the Pennsylvania Constitution against unreasonable searches and seizures, (4) his state constitutional right of privacy, and (5) his common law right against invasion of privacy. Although he fails to definitively set forth the grounds for his Petition to this Court, he appears again to advance each of these five claims. However, none but the first two of these, which claims arise under the Constitution of the United States, may be considered by this Court; this Court may not review a state court's determination with regard to alleged violations of state law. *See Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 535 (1941); 28 U.S.C. §1257. Thus, this Court's jurisdiction in the present case is based entirely on the petitioner's claims of violations of the Fourth Amendment and of his federal Constitutional right of privacy.

The mere recitation of Constitutional claims, however, is not sufficient to confer jurisdiction upon this Court. Such

claims "must not be frivolous or wholly without foundation"; rather, they "must at least have fair color of support, for otherwise an utterly baseless Federal right might be set up or claimed in almost any case, and the jurisdiction of [the Supreme Court] invoked merely for purposes of delay." *Parker v. McLain*, 237 U.S. 469, 471 (1915); *see, e.g., Wick v. Chelan Electric Co.*, 280 U.S. 108 (1929); *New Orleans Waterworks Co. v. Louisiana*, 185 U.S. 336 (1902) (analysis of Supreme Court's prior decisions revealed that Constitutional claim was clearly without color of foundation).

In the present case the petitioner's federal Constitutional claims lack the substantiality necessary to permit review by this Court. Absent is the critical element of state action, without which there can be no violation of the Fourth Amendment or of the Constitutional right to privacy. The petitioner's attempts to find state action in the circumstances at bar are imaginative, at best, and serve only to highlight the weakness of his arguments. His Constitutional claims are therefore frivolous and wholly without foundation.

With regard to his Fourth Amendment claim, the petitioner himself acknowledges that no protection is afforded against searches—wrongful, unreasonable or otherwise—by private parties. Indeed, it has been settled for more than sixty years that searches or seizures by private parties cannot violate the Fourth Amendment. *Burdeau v. McDowell*, 256 U.S. 465 (1921); *see Walter v. United States*, 447 U.S. 649, 656 (1980).

Similarly, to the extent that this Court has thus far recognized a right to privacy which derives from the Constitution, that right has been limited strictly to circumstances involving unwanted governmental intrusions. *E.g., Zablocki v. Redhail*, 434 U.S. 374 (1978); *Carey v. Population Services International*, 431 U.S. 678 (1977); *Moore v. East Cleveland*, 431 U.S. 494 (1977); *Cleveland Board of Education v. Le Fleur*, 414 U.S. 632 (1974); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v.*

Baird, 405 U.S. 438 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); *see Stanley v. Georgia*, 394 U.S. 557, 564 (1969). No decision by this Court has yet unearthed from the Constitution a right to be free from unwanted intrusions by private parties. Indeed, the petitioner has cited no decision by *any* court supporting such a right.

The Company in this case is a private party. It is not engaged in a state regulated industry; it has no monopoly with respect to any product or service; its officers and directors are neither elected by the public nor appointed by public officials; it is not subsidized by state or federal funds. The facility at which the petitioner was employed is a steel fabrication plant—a prototype of private industry in the United States. Furthermore, the Company's random inspections of employees' packages were and are conducted solely by its own security personnel.

In apparent appreciation of the difficulty in asserting his Constitutional claims against a private party such as the Company, the petitioner has devoted considerable imagination and creativity to a search for state action under the circumstances of the present case. He relies first upon the following testimony by the Company's Chief of Plant Security, Donald Shellenberger, which was given at the hearing before Unemployment Compensation Referee Warwick on September 11, 1980:

> QCL: Your guards, what's their relationship with the local police? Have you ever called in the polic (sic) to assist your guards?
>
> AEW5: At times, yes.

(Petitioner's Appendix A43.)

This isolated testimony, removed from its context,[2] cannot support the conclusion which the petitioner would draw

[2] In the Appendix to his Petition, the petitioner includes from Mr. Shellenberger's testimony only this single question and answer. He does so with the apparent hope that this Court will draw an inference which is not

(continued)

from it. Although Mr. Shellenberger stated that police assistance has at times been requested, he was not asked whether such assistance was ever required in connection with the inspection of employees' packages, and so the conclusion that police assist with such inspections cannot now be drawn. The Company, like any private citizen, has occasionally requested police assistance when circumstances warranted it, *e.g.*, when someone is discovered engaged in criminal activity on plant premises, but police do not participate in the inspections at issue here. Moreover, the petitioner does not dispute that police did not in any way assist with the inspection on May 29, 1980. Because the petitioner's counsel was careless in the examination of his witness, he cannot now remedy that carelessness by means of imaginative extrapolation of actual testimony.[3]

The petitioner next asserts that the Company itself is not a private party because, as a corporation, "it is wholly a creature of the state of its incorporation, deriving and owing its being to that state as surely as petitioner owes his to the Almighty." (Petition at 26). This contention introduces a radically new concept—the attribution of governmental characteristics and authority to all corporate persons—which conflicts directly with well established tenets of American jurisprudence. It therefore warrants summary dismissal.

This Court, in the context of state regulated industries (with which the state is far more closely involved than it is with the Company in the present case), has required that a complaining party show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as

warranted, for the context from which this testimony has been removed reveals that Mr. Shellenberger was not addressing himself to the Company's practice of randomly inspecting employees' packages.

[3]The Pennsylvania Commonwealth Court thought so little of this argument by the petitioner's counsel that it was not even mentioned in that court's opinion.

that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). This showing is required in order "to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, ____ U.S. ____, 102 S.Ct. 2777, 2786 (1982) (emphasis original). Clearly, the petitioner cannot — nor does he purport to — make any such showing here. His reliance on the state's role in chartering the Company to furnish the requisite state action does not even recommend the fertility of his imagination.

Alternatively, the petitioner suggests — albeit not very coherently — that the Company's activities should be regarded as state action under the doctrine of *Marsh v. Alabama*, 326 U.S. 501 (1946). *Marsh* stands for the proposition that, where a company owns or possesses an entire town, the company may not exercise its property rights in that town (*e.g.*, the exclusion of trespassers) in such a way as to restrict the Constitutional (*e.g.*, First and Fourteenth Amendment) rights of the town's inhabitants. It therefore applies to a situation where a private, corporate entity assumes the role and the functions of a municipality or other governmental unit. *See Hudgens v. NLRB*, 424 U.S. 507, 512-521 (1976). It has no application to a corporation which merely owns and operates an industrial plant where employees spend only a fraction of each day during their work week. *See generally Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

Finally, the petitioner seeks to rely on this Court's decisions in *Thomas v. Review Board, Indiana Employment Security Division*, 450 U.S. 707 (1981), and *Sherbert v. Verner*, 374 U.S. 398 (1963), wherein a state's denial of unemployment compensation benefits was itself found to be state action which violated the plaintiff's Constitutional rights.[4] In each of those

[4] The petitioner also cites *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), which had nothing to do with unemployment compensation. The plaintiff in that case challenged his public employer's motives for discharging him as violative of his First Amendment rights. The action of which he complained was clearly state action, since his employer was a public body.

cases the plaintiff's unemployment was directly attributable to his or her adherence to religious beliefs. The Court held, in substance, that the state's denial of benefits under such circumstances violated the rights guaranteed to the plaintiffs by the Free Exercise Clause of the First Amendment.

The present case may readily be distinguished from cases involving the First Amendment, such as *Thomas* and *Sherbert*. The First and Fourteenth Amendments guarantee, *inter alia.*, that the rights of free speech and the free exercise of religion may not be abridged by any law. To the extent that unemployment compensation laws deny benefits to those who become unemployed as a result of the exercise of rights which are protected by the First and Fourteenth Amendments, those laws violate the Constitution.

In the present case, however, the petitioner's temporary unemployment was not occasioned by his exercise of a constitutionally guaranteed right, since, as already discussed, he had no such right with regard to inspections or searches by a private party such as the Company. Hence, there is no basis for concluding that Pennsylvania's denial of unemployment compensation benefits is impermissible state action in violation of the Constitution. For this reason the Pennsylvania Commonwealth Court found *Thomas* and *Sherbert* inapposite (Petitioner's Appendix A19-A21).

Thus, the petitioner's arguments that state action is somewhere present in the circumstances of this case are without support by any decision of a state or federal court and are in fact contrary to settled law. Absent state action, the petitioner's Constitutional claims are frivolous and wholly without foundation. More is required to confer jurisdiction upon this Court than a fervent complaint of some perceived injustice, no matter how sincere the complainant's belief. Here the petitioner has established no basis for this Court's jurisdiction, and his Petition must therefore be denied.

II. Even if this Court has jurisdiction to review the present case, the circumstances clearly do not warrant the grant of certiorari.

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." U.S. Supreme Court Rule 17.1. Accordingly, relatively few of the petitions for writ of certiorari which this Court receives are worthy of its attention. Rule 17 of the U.S. Supreme Court Rules sets forth guidelines for the grant of certiorari and provides, in pertinent part, that the following cases are appropriate for the Court's review:

> (1) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (2) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

U.S. Supreme Court Rule 17.1(b) and (c). Clearly, the present case fails to satisfy these criteria.

The petitioner has cited no decision by this Court or any other court, state or federal, which is contrary to or even inconsistent with the decision of the Pennsylvania courts below. Thus, there is no conflict for this Court to resolve.[5]

[5] To the extent that the petitioner suggests that the Pennsylvania Commonwealth Court's decision in the present case is in any way inconsistent with its decision in *White v. Unemployment Compensation Board of Review*, 17 Pa. Commw. Ct. 110, 330 A.2d 541 (1975), he misrepresents the latter holding. The court in *White* noted only that it was not confronted with the issue raised by the present case and therefore did not resolve that issue at that time. 17 Pa. Commw. Ct. at 111-112. Even if the petitioner were correct, however, conflicts and inconsistencies between decisions of the courts of Pennsylvania — or of any other individual state — are not for resolution by this Court.

Furthermore, the Pennsylvania courts have decided no important question of federal law that has not been, but should be, settled by this Court, except in the most narrow sense that the precise issue in the present case, *viz.*, whether the petitioner's Constitutional rights have been violated by the denial of unemployment compensation benefits for a period during which the petitioner was placed on disciplinary suspension for refusing to cooperate with a random inspection of employees' packages by his employer, has not heretofore been decided by this Court. The resolution of that issue, however, for the reasons discussed in the immediately preceding section of this Brief, requires nothing more than the application of well settled legal principles which have been recognized by this Court and adopted by state and federal courts alike. Thus, this Court's review is not warranted by the "novelty" of the decision below.

In short, there is no "special and important" reason for granting certiorari in the present case. Despite the petitioner's colorful characterization of the issue as the restoration and preservation of the dignity and integrity of the working man, he presents no Constitutional or legal claim which requires resolution by this Court. Rather, the law applicable to his federal Constitutional claims is clear, and those claims have, in effect, already been adjudicated three times at the administrative level and twice by Pennsylvania appellate courts. He has had his "day in court," and his frivolous claims warrant no further waste of judicial resources.

In this regard, it is worth recalling the words of Chief Justice Taft concerning this Court's certiorari jurisdiction:

> No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for

> the purpose of expanding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal.

Hearings before the Committee on the Judiciary of the House of Representatives on H.R. 10479, 67th Cong., 2d Sess. 2. The present case involves legal issues of such general interest and importance only in the mind of the petitioner himself. His Petition should therefore be denied.

CONCLUSION

The petitioner has failed to state federal claims sufficient to establish this Court's jurisdiction to review the decisions of the Pennsylvania courts in the present case. Even if this Court has such jurisdiction, however, the Constitutional issues raised by the petitioner are resolved by well settled principles of law. There are no special and important reasons for granting certiorari. The Petition should therefore be denied.

Respectfully submitted,

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